



DEPARTMENT OF TRANSPORTATION

[Docket No. DOT-OST-2022-0047]

Construction Materials Used in Federal Financial Assistance Projects for Transportation Infrastructure in the United States under the Build America, Buy America Act; Request for Information

AGENCY: Department of Transportation (DOT).

ACTION: Notice; request for information.

SUMMARY: The Build America, Buy America Act (BABA), enacted as part of the Bipartisan Infrastructure Law (BIL) on November 15, 2021, requires iron, steel, manufactured products, and construction materials used in infrastructure projects funded by Federal financial assistance to be produced in the United States. DOT is seeking input on the requirement as applied to construction materials: how the requirement should be interpreted and implemented, the present availability of construction materials produced in the United States that are commonly used in transportation infrastructure projects, and the potential impacts to DOT-funded projects.

DATES: Written submissions must be received by **[INSERT DATE 21 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**. DOT will consider comments received after this date to the extent practicable.

ADDRESSES: Please submit any written comments to Docket Number DOT-OST-2022-0047 electronically through the Federal eRulemaking Portal at <https://www.regulations.gov>. Go to <https://www.regulations.gov> and select “Department of Transportation (DOT)” from the agency menu to submit or view public comments. Note that, except as provided below, all submissions received, including any personal information provided, will be posted without change and will be available to the public on <https://www.regulations.gov>. You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477) or at <https://www.transportation.gov/privacy>.

FOR FURTHER INFORMATION CONTACT: For questions about this RFI, please contact Darren Timothy, Office of the Assistant Secretary for Transportation Policy, at darren.timothy@dot.gov or (202) 366-4051; Jason Luebbers, Federal Transit Administration, at jason.luebbers@dot.gov or (202) 366-8864; Lauren Gill, Maritime Administration, at lauren.gill@dot.gov or (202) 366-2150; John Johnson, Federal Railroad Administration, at john.johnson@dot.gov or (202) 493-0078; Patrick Smith, Federal Highway Administration, at patrick.c.smith@dot.gov or (202)366-1345; or Carlos Fields, Federal Aviation Administration, at carlos.fields@faa.gov or (202) 267-8826 .

SUPPLEMENTARY INFORMATION:

Construction Materials Procured Under Department of Transportation Programs

On November 15, 2021, President Biden signed into law the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, which includes the Build America, Buy America Act (BABA). Pub. L. No. 117-58, div. G §§ 70901-52. BABA’s requirements for the use of iron, steel, manufactured products, and construction materials produced in the United States will bolster America’s industrial base, protect national security, and support good-paying jobs.

Consistent with Executive Order 14005, Ensuring the Future Is Made in All of America by All of America’s Workers (E.O. 14005), BABA affirms the Biden-Harris Administration’s priority to “use terms and conditions of Federal financial assistance awards to maximize the use of goods, products, and materials produced in, and services offered in, the United States.” (E.O. 14005). Under BABA, all iron, steel, manufactured products, and construction materials used in

infrastructure projects funded at least partly by Federal financial assistance must be produced in the United States.¹

One of the new Buy America preferences included under Section 70914 of the Act is for construction materials. As of May 14, 2022, each covered Federal agency must ensure that all manufacturing processes for construction materials used in Federally assisted infrastructure projects occur in the United States. None of the specific statutes that apply particular Buy America² requirements to the Federal financial assistance programs administered by DOT's Operating Administrations (OAs), including 49 U.S.C. 50101 (FAA); 23 U.S.C. 313 (FHWA); 49 U.S.C. 22905(a) (FRA); 49 U.S.C. 5323(j) (FTA); and 46 U.S.C. 54101(d)(2) (MARAD), specifically cover construction materials, other than to the extent that such materials would already be considered iron, steel, or manufactured products.

Waivers are authorized under BABA where (1) applying the Buy America requirement would be inconsistent with the public interest; (2) where the iron, steel, manufactured product, or construction material is not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality; and (3) where inclusion of the domestic products or construction materials will increase the cost of the overall project by more than 25 percent. BIL § 70914(b). On May 19, 2022, DOT issued a temporary waiver of the construction materials requirement for 180 days, from May 14 until November 10, 2022. 87 FR 31931. Federal awards that DOT makes on or after November 10 will be subject to the requirement that construction materials used in the project are produced in the United States.

In the waiver notice, DOT stated that “public interest waivers should be used sparingly” and that stakeholders must rapidly adopt procedures during the waiver period to ensure compliance with the new requirement after expiration of the waiver. During the waiver period,

¹ Under section 70917(a) of the BIL, the BABA requirements apply to financial assistance programs for infrastructure only to the extent that a domestic content procurement preference does not already apply to iron, steel, manufactured products, and construction materials. Thus, the BABA requirement for construction materials supplements the existing DOT Buy America requirements for steel, iron, and manufactured products.

² In this notice, references to “Buy America” include domestic preference laws called “Buy American” that apply to DOT financial assistance programs.

DOT continues its engagement to help facilitate the creation of robust enforcement and compliance mechanisms and to rapidly encourage domestic sourcing of construction materials for transportation infrastructure improvements.

Interim Standards for Construction Materials

Under BABA, construction materials are “produced in the United States” if “all manufacturing processes” for the materials occurred in the United States. BIL § 70912. BABA directs the U.S. Office of Management and Budget’s Made in America Office (MIAO) to issue standards that define the term “all manufacturing processes” as it applies to construction materials produced in the United States. On April 18, 2022, OMB issued memorandum M-22-11, “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure” (OMB Initial Implementation Guidance). Section VIII of the OMB Initial Implementation Guidance states: “Pending MIAO’s issuance of final standards on construction materials ... agencies should consider ‘all manufacturing processes’ for construction materials to mean the final manufacturing process and the immediately preceding manufacturing stage for the construction material.” OMB Initial Implementation Guidance at 14.

The OMB Initial Implementation Guidance also contains a preliminary list of construction materials that includes:

[A]n article, material, or supply—other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives—that is or consists primarily of:

- non-ferrous metals;
- plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
- glass (including optic glass);
- lumber; or

- drywall.

OMB Initial Implementation Guidance at 13-14. On April 21, 2022, OMB also issued a request for information to gather public input on its development of standards for construction materials. 87 FR 23888. The OMB RFI states that it “seeks input on whether to refine this list, and requests input on specific materials or products or categories of materials or products that should be added, removed, or clarified, as well as advice on how to distinguish construction materials from manufactured products.”

The OMB Initial Implementation Guidance additionally indicates that:

[I]tems that consist of two or more of the listed materials that have been combined together through a manufacturing process, and items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process, should be treated as manufactured products, rather than as construction materials. For example, a plastic framed sliding window should be treated as a manufactured product while plate glass should be treated as a construction material.

OMB Initial Implementation Guidance at 14. The OMB Initial Implementation Guidance also states that an article, material, or supply should be classified into only one of the following categories: (1) iron or steel; (2) a manufactured product; or (3) a construction material; an article, material, or supply should not be considered to fall into multiple categories. *Id.* at 6.

Request for Information

In the May 19 final waiver notice, DOT stated that it “continues to encourage suppliers and other stakeholders to inform DOT of any procedures that may be developed or be in place to certify the compliance of construction materials with the domestic preference requirement in the Act. That information helps DOT rapidly encourage domestic sourcing and potentially shorten the effective period or narrow the applicability of the transitional waiver. The Department also encourages supplier and other stakeholders to identify categories of construction materials that currently have sufficient domestic availability to support DOT-assisted infrastructure projects, to

assist contractors and project sponsors in incorporating compliant products in their projects and to help the Department focus its activities to benefit domestic manufacturers.”

To assist in gathering this information, DOT seeks input from the public, including DOT’s project sponsors, their contractors and offerors, manufacturers, labor unions, transportation and trade associations, and other interested parties on implementing the new construction materials requirement. DOT seeks information in several categories related to identifying and categorizing articles as construction materials for transportation infrastructure projects; establishing procedures for certifying the origin of construction materials; and determining which construction materials commonly used in transportation infrastructure projects are or are not produced in the United States in sufficient quantity and quality.

This RFI is intended to assist DOT in implementing and ensuring compliance with OMB standards. Responses to this RFI will further the goals and objectives of BABA and E.O. 14005 by providing information to assist the Department in implementing the construction materials requirement for transportation infrastructure projects to maximize the use of construction materials produced in the United States while ensuring the efficient and effective delivery of projects. The type of feedback that would be especially useful includes information on the impact of the construction materials requirement on DOT-funded projects, as well as input and recommendations on an effective compliance certification process for construction materials.

Commenters should identify any administrative burdens, program requirements, or unnecessary complexity as they relate to the BABA construction materials requirement that may impose unjustified barriers to transportation project delivery under DOT-funded assistance programs in general, or that may have adverse effects on equity for all, including individuals who belong to underserved communities that have been denied equitable treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities, including learning

disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

Commenters should provide, with as much detail as possible, an explanation why their recommendations advance the statutory objectives of BABA for DOT-funded projects and the policies stated in section 2 of E.O. 14005. Additionally, where applicable, please provide citations and sources that support your recommendations. All information submitted will assist DOT in determining the extent to which additional guidance or other actions are necessary to implement the construction materials requirement. However, stakeholders should not expect that DOT will extend the existing temporary waiver beyond November 10, 2022.

If commenters identify benefits, costs, burdens, or shortcomings of particular options for implementing the BABA construction materials requirement, commenters should provide data and evidence to support these conclusions.

Specific Questions

DOT is providing the following questions to prompt feedback. DOT encourages public comment on any or all of these questions, and also seeks any other information commenters believe is relevant. Except where noted, the questions below are intended to apply to all financial assistance programs for transportation infrastructure are administered by DOT's OAs. However, the Department also welcomes feedback that may be tied to specific programs and agency requirements.

- (1) In addition to those construction materials identified by OMB, are there specific materials, products, or categories of materials or products that are commonly used in DOT-funded projects that should be included as "construction materials" for the purpose of BABA implementation?

(2) Are there materials used in DOT-funded projects that do not clearly fit in any one of the three categories: steel and iron; manufactured products; or construction materials? How should DOT assign them to one of these statutory categories?

(3) Are there items that DOT agencies currently treat as manufactured products that should instead, under the OMB Initial Implementation Guidance, be treated as construction materials?

(4) Based on the definition of “all manufacturing processes” in the OMB Initial Implementation Guidance, what do you consider “the final manufacturing process” and the “immediately preceding manufacturing stage” for common goods used in DOT-funded projects in each category of construction material listed in the OMB Initial Implementation Guidance or any other category you identify in response to Question 1 above?

- i. Non-ferrous metals
- ii. Plastic and Polymer based Products
- iii. Glass
- iv. Lumber
- v. Drywall
- vi. Other (please specify)

(5) Are the final manufacturing process and the immediately preceding manufacturing stage different for different types of products made from similar materials (e.g., Polyvinyl Chloride (PVC) or High-Density Polyethylene (HDPE) pipe vs. PVC or HDPE lumber)?

(6) Certain DOT OAs have long provided definitions of “manufacturing processes” in their implementing regulations for Buy America requirements. For example, FTA’s regulation at 49 CFR 661.3, which it applies to manufactured products, states: “[T]he application of

processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials.” FHWA’s regulation for steel and iron materials at 23 CFR 635.410(b)(1) applies to all “manufacturing processes, including application of a coating, for these materials must occur in the United States. Coating includes all processes which protect or enhance the value of the material to which the coating is applied.” Should the same (or a similar) definition of a manufacturing process apply to the final manufacturing process and the immediately preceding manufacturing stage for construction materials commonly used in DOT-funded projects? If not, why not, and is there another standard for manufacturing processes that might be more appropriate to apply to construction materials?

- (7) Are there some items in OMB’s list of construction materials that typically are used in DOT-funded projects only after they have been combined into a manufactured product? For example, is glass regularly used by itself as a construction material, or does it usually arrive at a project already incorporated with other materials as a manufactured product?
- (8) FTA already has an established procedure for bidders or offerors to certify the origin of steel and iron and manufactured products in its implementing regulation at 49 CFR § 661.6. Should FTA require the same procedure to assure the origin of construction materials for FTA-funded projects? If not, what should FTA do differently?
- (9) Under FHWA-funded programs, State DOTs are responsible for Buy America compliance, per 23 CFR 635.410(d). Bidders are required to comply with the project specifications, including Federal-aid projects with Buy America requirements. Most State DOTs require certifications/Step-certifications from bidders/contractors/suppliers to

ensure compliance. Should FHWA continue to follow this process for certifying construction materials? If not, what should FHWA do differently?

(10) A commenter on DOT's proposed temporary Buy America waiver for construction materials stated that "the ability to certify materials will grow over time, so there should be a good faith certification process that can be refined over time." What would such a "good faith certification process" that can be implemented in the near term (i.e., prior to the expiration of the temporary waiver on November 10, 2022) look like? What steps would be required to refine those processes over time?

(11) Is the standard in the OMB Initial Implementation Guidance sufficiently clear to enable a bidder or offeror for a DOT-funded project to certify the construction materials to be used in the project are produced in the United States? If not, what further clarification is needed?

(12) Are there construction materials commonly used in DOT-funded projects for which suppliers or manufacturers cannot readily determine or trace the country of origin of the final manufacturing process and the immediately preceding manufacturing stage? Are there records or documentation already in use that could serve as evidence of the origin of these to manufacturing processes (e.g., country of origin documentation, mill markings, quality control tracking)?

(13) Are there any construction materials commonly used in DOT-funded projects that are known not to be produced in the United States based on OMB's final manufacturing process and the immediately preceding manufacturing stage standard, or are known not to be produced in sufficient quantity or of satisfactory quality? What is the basis for that knowledge?

(14) Which construction materials commonly used in DOT-funded projects currently are produced in the United States in sufficient and reasonably available amount and of

satisfactory quality? Please feel free to provide any additional information on how production of these construction materials in the United States supports the regional or local economy or workforce.

(15) Are there construction materials commonly used in DOT-funded projects that are produced in the United States but subject to supply constraints? Please be specific regarding lead times or delays that will be experienced on DOT-funded projects as a result of a specific construction material supply constraint. Is the constraint on domestic supply a recent phenomenon (i.e., beginning in 2020 or later), or is it a longstanding market condition?

(16) Are there construction materials commonly used in DOT-funded projects that previously were not produced in the United States but are currently produced in the United States or are in the process of “onshoring” as a result of recent statutory, regulatory, or market changes?

Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this RFI contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this RFI, it is important that you clearly designate the submitted comments as CBI. You may ask DOT to give confidential treatment to information you give to the Department by taking the following steps: (1) Mark each page of the original document submission containing CBI as “Confidential”; (2) send DOT, along with the original document, a second copy of the original document with the CBI deleted; and (3) explain why the information you are submitting is CBI. Unless you are notified otherwise, DOT will treat such marked submissions as confidential under the FOIA, and they

will not be placed in the public docket of this RFI. Submissions containing CBI should be sent to Darren Timothy, Office of the Assistant Secretary for Transportation Policy, 1200 New Jersey Avenue SE, OST P-20, Washington, DC 20590. Any comment submissions that the DOT receives that are not specifically designated as CBI will be placed in the public docket for this matter.

Issued in Washington, DC on July 22, 2022.

Polly E. Trottenberg,

Deputy Secretary.

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